Statement Before the Subcommittee on Energy & Air Quality of the U.S. House of Representatives

Hearing on Clean Air Act Transportation Conformity Provisions Contained in the "Transportation Equity Act: A Legacy for Users" (H.R. 3)

By the
American Road & Transportation Builders Association
March 2, 2005

Introductory Remarks

Good afternoon Mr. Chairman, Ranking Member Boucher and members of the Subcommittee. Thank you very much for providing the American Road & Transportation Builders Association (ARTBA) with the opportunity to present its views on the transportation conformity process and reform provisions related to it in H.R. 3, "The Transportation Act: A Legacy for Users."

I am Brian Holmes, executive director of the ARTBA affiliated Maryland Highway Contractors Association (MHCA). Prior to joining MHCA, I served 13 years as director of regulatory affairs for the Connecticut Construction Industries Association, also an ARTBA state affiliate. I am also privileged to serve as chairman of the Nationwide Public Projects Commission.

I am here today representing ARTBA, whose eight membership divisions and more than 5,000 members nationwide, represent all sectors—public and private—of the U.S. transportation design and construction industry. ARTBA, which is based in Washington, D.C., has provided the industry's consensus policy views before Congress, the Executive Branch, federal judiciary and the federal agencies for 103 years.

The transportation design and construction industry ARTBA represents generates $200 billion annually to the nation's Gross Domestic Product and sustains the employment of more than 2.5 million Americans.

I would like to say at the outset that ARTBA shares your interest in assuring that all Americans breathe clean air. We are not here today to suggest a radical overhaul of the conformity process.

We would, however, like to suggest some badly-needed "fine-tuning" of federal law that will not only improve public health from a clean air perspective, but also improve the efficiency of making environmentally-sound and needed transportation investments.

General Background on the Clean Air Act and the Transportation Conformity Process

Under the federal Clean Air Act, the U.S. Environmental Protection Agency (EPA) regulates six criteria pollutants: ozone, carbon monoxide, nitrogen dioxide, sulfur dioxide, particulate matter (also known as soot and dust) and lead. For each pollutant, EPA has established minimal targets known as the National Ambient Air Quality Standards (NAAQS) that must be met by state and local governments.

If an area exceeds EPA's standards for any one of these "criteria" pollutants, it is designated a nonattainment area, triggering a series of steps that must be taken to come into compliance with the standards. In addition, for ozone, carbon monoxide and some particulate matter nonattainment areas, the EPA further classifies the area based on the magnitude of the nonattainment. These classifications are used to specify what pollution reduction measures must be adopted for the area and what deadlines must be met to bring the area into attainment.

Once an area is designated as nonattainment, the state must establish a State Implementation Plan (SIP) outlining how the state will come into compliance with EPA standards over a designated period of time. The SIP includes an emissions budget that shows allowable levels of emissions from three separate sources. They are stationary sources (i.e., power plants, factories), area sources (i.e., dry cleaners, gas stations) and mobile sources (i.e., cars, lawnmowers). The mobile

source portion of the emissions budget is further subdivided to include a Motor Vehicle Emissions Budget (MVEB), which is the total emissions allowed for cars and trucks. Once this number is known, metropolitan planning organizations (MPOs) are charged with putting together both short-term Transportation Improvement Programs (TIPs) and long term Regional Transportation Plans (RTPs) that demonstrate projected emission that are less than the MVEB. Thus the TIP and RTP must fit within the constraints established by the SIP.

The transportation conformity process refers to the requirement set forth in Section 176 of the Clean Air Act that air emissions generated by transportation projects match or "conform" to emissions budgets established in state air quality plans. If the TIP does not conform with the SIP, the area is deemed to be out of conformity. If an area is out of conformity, federal highway funds are cut off. As a result, an area's TIP cannot include highway or transit transportation construction projects that will accommodate transportation anticipated to result in emissions that exceed the MVEB.

Transportation Sector Successes in Achieving Cleaner Air

Mr. Chairman, there's no doubt that we have made great progress over the past 30 years in improving the nation's air quality. Much of this progress has been achieved through technology advancements spurred by motor vehicle emissions standards and controls and cleaner motor fuels. According to a report recently released by the Environmental Protection Agency entitled "Air Emissions Trends, Continued Progress Through 2003," emissions from highway vehicles were dramatically reduced between 1970 and 2003. Specifically, carbon monoxide emissions were reduced by 64 percent, volatile organic compounds—a precursor to ozone—were reduced 74 percent, particulate matter (PM-10) emissions declined 61 percent, and nitrogen oxide (NOx)

emissions went down by 42 percent. These numbers are even more remarkable given that since 1970, the U.S. population has grown more than 39 percent, the number of licensed vehicles has increased about 90 percent and the number of vehicle miles traveled has increased 155 percent.

In addition, earlier this year, major automobile manufacturers announced a new generation of vehicles that are 99 percent cleaner than vehicles produced 30 years ago. This reduction in emissions comes from a four-part strategy that includes cleaning up the fuel as it goes into the vehicle, burning the fuel more precisely in the engine, removing undesirable emissions with a catalyst after the engine, and monitoring all of these systems to ensure these minimal emission levels.

So you can see, Mr. Chairman, much of the progress that has been made in improving the nation's air quality, has come from the transportation sector.

Problems with the Conformity Process

Mr. Chairman, that leads me to my comments about the conformity process itself. There are two things I hope you take from this hearing today: (1) that government agencies and planning bodies need more flexibility on conformity; and (2) that the public—especially those who contract with government agencies to build transportation improvement projects—need more predictability in the transportation conformity process.

One of the major problems with the conformity process is that some have tried to turn it into an exact science, when it is not. Conformity determinations are based on assumptions and computer

modeling. All you have to do is to look back at the predictions made during the enactment of the Clean Air Act Amendments of 1990 to understand that "modeling of future events" often does not reflect reality.

An example of this is EPA's transition from the Mobile5 model to the Mobile6 model for predicting future on-road emissions. In applying the new Mobile6 model to current data, regions are experiencing a substantial short-term increase in predicted emissions for some pollutants as compared to the Mobile5 model. While over the long term the Mobile6 model shows decreasing emissions, this could cause substantial problems for many areas and threaten a potential conformity lapse in the short term. Even though the data being entered into the models is the same, each shows significantly different outputs.

This problem is amplified by the fact that quite often transportation plans and the SIPs they are supposed to conform with are often out of sync with one another. This is largely due to the fact that transportation plans have very long planning horizons and have to be updated frequently, while most air quality plans have very short planning horizons and are updated infrequently. As a result, many of the planning assumptions that must be used for conformity determinations of transportation plans and programs are not consistent with the assumptions that were used in the air quality planning process to establish emissions budgets and to determine appropriate control measures. In other words, because the most recent planning data must always be used, an increase in emissions and possible conformity lapses can occur simply because the numbers or models relied on in the transportation plan are not the same numbers relied upon in the air quality plan.

Part of this is due to the fact that the priority of various transportation projects often changes and every time this occurs, the plan needs to be updated.

While many have suggested that the planning horizons should be brought more in sync with one another, another option would be to simply allow greater flexibility in the process, recognizing the inexact science involved.

Rather than requiring plans to conform to the "nth-degree," perhaps a 10 percent "cushion" should be allowed so that transportation planners would not have to amend their plans every time they want to add or subtract even a relatively insignificant project.

Such a cushion would also permit some differences in planning data or models and would allow a margin of error for modeling assumptions planning organizations make but have no real way of predicting with precision—such as economic growth or the current price of gasoline—even though such things have a substantial impact on future travel or the use of larger vehicles like SUVs.

Very few conformity lapses occur because a region has a major clean air problem. They occur because one of the parties involved cannot meet a particular deadline. As a result, the conformity process has become a top-heavy bureaucratic exercise that puts more emphasis on "crossing the t's and dotting the i's" rather than engaging the public in true transportation planning that is good for the environment and the mobility of a region's population.

Opening the Door to Unnecessary Litigation

Mr. Chairman, flexibility in the conformity process also has been constrained by litigation initiated over the past several years by parties opposed to individual transportation projects and/or the concept of increasing highway capacity. This litigation will only increase in light of the recently enacted EPA requirements for PM-2.5 and ozone.

In 1997, in *Sierra Club v. EPA*, the court said EPA could not continue the practice of allowing areas that are new non-attainment areas to have a one-year grace period before they need to perform a conformity test. In yet another court case in 1999 (*Environmental Defense Fund v. EPA*), the court struck down EPA's practice of "grandfathering" projects when a conformity lapse occurs. Up to this point, when an area went into a conformity lapse projects could proceed if they had already met all of the necessary environmental requirements and were part of a conforming transportation plan at the time of the lapse. In defending its own rule before the court, EPA stated:

"EPA's rule reflects its rational judgment that Congress intended a more reasoned approach to transportation planning during periods in which there is no applicable SIP, that Congress intended that there be an attempt to balance the general pollution-reduction requirements of the Act with the needs of state and local planning organizations for certainty and finality in their transportation planning process."
42 U.S.C. 7506(c)(2). [*EDF v. EPA,* Case No. 97-1637, Respondent's Brief, June 10, 1998, p. 30.]

"EPA explained that it 'has always believed that there should only be one point in the transportation planning process at which a project-level conformity determination is necessary. This maintains stability and efficiency in the transportation planning process.'" [*EDF v. EPA,* Case No. 97-1637, Respondent's Brief, June 10, 1998, p. 36.]

Two other long-standing practices have also been struck down by the courts, which has reduced flexibility in the conformity process and deserve this subcommittee's attention:

- EPA is often not able to approve a state's motor vehicle emissions budget in time for a conformity determination to be made. Prior to the *EDF v. EPA* case mentioned above, these budgets were assumed to be automatically approved if EPA did not act within a certain period of time. That decision, however, struck down this long-standing practice.

- Many states have not been able to meet their ozone compliance deadlines since much of their clean air problem is the result of ozone drifting in from other areas, known as ozone transport. In the past, EPA has granted extensions to the deadline in some of these areas. However, in *Sierra Club v. EPA* (D.C. Cir. 2002), the court ruled that EPA does not have the authority to grant these extensions and must, instead, "bump" these areas into the next higher classification of nonattainment, which would trigger several additional mandatory control measures.

Without the flexibility option of "grandfathering" projects, we have seen a significant increase in conformity-related litigation. Those opposed to an individual project—or the mix of projects or modal funding in a transportation plan—have been given tremendous leverage by the *EDF v EPA* decision. They can now use conformity-related litigation as a sure way to temporarily, if not permanently, stop previously approved, environmentally sound projects and plans. Threatened with such litigation—or actually sued over conformity process-related issues—state and local planning agencies are put under enormous pressure to either give into the demands of the dissenting minority, or face endless rounds of litigation.

In response to this reality, ARTBA joined several other industry groups in 1999 to form Advocates for Safe and Efficient Transportation (ASET), a litigation group aimed at assisting governmental entities in defending the transportation planning and delivery process. While many of the professional environmental groups talk a lot about wanting a more "inclusive" transportation planning process, the fact of the matter is really quite different.

Since ASET was formed, it has spent hundreds of thousands of dollars, not in arguing the merits of many of these cases, but in battling with environmental groups over simply trying to get a seat at the table. I could provide you a pile of court briefs where groups like the Sierra Club argue adamantly that the construction labor organizations and industry should not have a say in the final decision about transportation plans. The truth is that the Sierra Club and many of their colleague organizations do not want an inclusive planning process. They want a process where they and they alone are allowed to influence the process.

When the planning process is allowed to be hijacked by any one individual group, bad decisions are made. The truth is that America needs a dynamic transportation network to meet the needs of a growing population and economy. Such a network should include improving public transit, increased utilization of synchronized traffic signalization and other "smart road" technologies, improving local management of traffic incidents to clear roadways quickly and adding road capacity where appropriate and desired by a majority of local citizens. This is key to reducing traffic congestion and the unnecessary auto, truck and bus emissions it causes. It is also essential to maintaining time sensitive ambulance, police and fire emergency response service.

On a related front, the Sierra Club recently initiated litigation which has temporarily halted a desperately needed highway improvement project on U.S. 95 in Las Vegas, Nevada. ARTBA, realizing the far reaching implications of this litigation filed a "friend of the court" brief supporting the United States Department of Transportation in the case.

This type of litigation demonstrates that professional environmental groups will use any legislative loophole available to delay desperately needed transportation construction process. These actions on the part of the professional environmental community further show that the transportation planning process needs to be insulated from needless litigation.

Mr. Chairman, I believe very strongly in the transportation planning process – a process that involves public involvement by all stakeholders and final decisions that are made by public officials. However, we have come to a point where the planning process is breaking down under a mound of litigation.

The Human & Economic Costs of Delaying Transportation Improvements

Mr. Chairman, there are several very important reasons—often missing from the debate—for making sure that the transportation conformity process is reformed to limit its use by those whose aim is simply to obstruct transportation development:

- Unnecessary delays thrown in the way of transportation projects delay infrastructure improvements that can cut the harmful emissions and billions of dollars in wasted motor fuel caused by traffic congestion.

- Such delays drive up the ultimate construction cost for the project to the taxpayer. In this case, time certainly is money.

- Most importantly, however, they delay the initiation of infrastructure improvements that can save lives and prevent injuries. With more than 42,000 Americans dying each year on the nation's roadways, that should be a primary consideration. The fact is, one third more people die each year in motor vehicle crashes than die of bronchitis and asthma combined. Motor vehicle crashes are the leading cause of death of young Americans under the age of 25.

Changes to the Transportation Conformity Process in the "Transportation Equity Act: A Legacy for Users" (H.R. 3)

Mr. Chairman, provisions in H.R. 3 concerning transportation conformity address a number of the problems associated with the process and we strongly support these proposals.

Conformity Redeterminations

Section 1824(a) of H.R. 3 extends the requirement for new conformity determinations resulting from an EPA finding of adequacy or approval of a new MVEB to two years. This is an improvement over the current regulations which require conformity determinations within 18 months. Again, this is a positive step.

Beyond this, what is needed is MVEB adequacy and regulatory flexibility. A 1999 court ruling struck down an EPA rule that conferred automatic MVEB approval if EPA did not act promptly and called into question EPA's overall process for approving MVEBs in submitted-but-not-yet-approved SIPs. Conformity obligations often arise with short notice due to changes in attainment

status or failure of EPA to timely approve MVEBs or SIPs. Without an approved MVEB, conformity determinations cannot be found and transportation projects cannot be approved.

Frequency of Conformity Determination Updates

Section 1824(b) of H.R. 3 extends the timeline for determining conformity to every four years with all too frequent exceptions when an MPO chooses to update the plan or TIP more frequently or when SIP actions trigger a new conformity determination. This is an improvement over the current law, which requires conformity determinations every three years.

By extending the timeframe for conformity determinations, H.R. 3 cuts down on unnecessary requirements that do not have any analytical value unless there has been a major change in emissions.

Another method of dealing with this issue would be to require conformity updates only in instances where a changed TIP affects projected emissions by more than a set threshold amount.

A new conformity determination should not be required if one or several projects are added to the transportation plan or TIP, as long as the net emissions from their inclusion will not add more than three percent to projected transportation emissions in the plan. In reality, added transportation emissions that might be facilitated by a single highway project are minuscule. This would avoid what is largely a paperwork exercise.

Conformity determination should not be done simply for its own sake. It is a very intensive and rigorous process. Rather, it should only be required only when significant changes to the TIP

warrant. H.R. 3, by extending the time frame for conformity determinations, is a good step in this direction.

Time Horizon for Conformity Determinations in Nonattainment Areas

Section 1824(c) of H.R. 3 limits conformity to the end of the maintenance period provided that the MPO and air quality agency agree. the "Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004" (S. 1072) as passed by the Senate last session, did not contain the requirement that the MPO and air quality agency agree. This is a more efficient approach, as there should not be a need for the agreement of the MPO and the air quality agency here. If the maintenance period has ended, then conformity determinations should no longer be required. By tying this decision to the agreement of the MPO and air quality agency, this provides an unwelcome opportunity for extension of the conformity requirements when they are no longer needed.

Section 1824(c) of H.R. 3 further provides that, in general, conformity findings must be based on the last (20^{th}) year of transportation plans. It allows, with agreement of the MPO and applicable air quality agency, conformity findings to be based on the latest date of the 10th year of the transportation plan, the attainment date of the SIP, or the year after the completion date of a regionally significant project (if approval is required before a subsequent conformity determination). Regional emissions analysis must be done for the remaining years of the transportation plan.

While this enhanced flexibility is positive, H.R. 3 does not include provisions allowing for the imprecision of data inputs to be appropriately accommodated. As stated above, modeling is an inexact science at best. Requiring conformity to be demonstrated to the "n^{th}" decimal point makes

little sense from a public policy standpoint. We recommend that, conformity should be allowed to be demonstrated if the emissions from the transportation plan are at least within 10 percent of the emissions budget. In addition, SIPs should contain an adequate "margin of safety" to avoid conformity lapses due to marginal changes in expectations.

Substitution of Transportation Control Measures

Section 1824(d) of H.R. 3 allows the substitution of transportation control measures without a mandatory SIP revision under certain circumstances. This is a positive change that allows for alternate planning without triggering an unnecessary SIP revision process.

Lapse of Conformity

Section 1824(e) of H.R. 3 provides that "conformity lapses" will not take effect until 12 months for projects approved prior to a finding that an area is not within conformity. This is a welcome relief from the rigidity of the conformity process allowing projects to continue while actions are taken to return to conformity. Abruptly halting transportation projects after a finding of nonattainment is both costly and inefficient. This reinstatement of the one-year grace period also will cut down on unnecessary lawsuits designed to delay and halt vitally needed transportation projects.

The goal of H.R. 3's grace period provision could be further accomplished by the restoration of grandfathering or the creation of other safe harbors for projects. Conformity must be forward-looking. Retroactive invalidation of projects after funding approval is counterproductive to smart growth and mobility considerations. Conformity lapses stop all projects, transit and highway alike, and puts construction crews out of work without notice. Once a transportation project is in a

conforming plan, it should be permanently grandfathered until built or removed from the plan. Legislation introduced last congress by Representative Kevin Brady (R-TX) and Representative Gene Green (D-TX), and cosponsored by Subcommittee Chairman Ralph Hall (R-TX) and others this subcommittee, H.R. 673 "The Safe Highways and Roads Act", accomplished this goal.

The conformity provisions of H.R. 3 represent a significant step forward in improving the transportation conformity process.

Additional Conformity Reform Recommendations for Inclusion in H.R. 3

While ARTBA fully supports the reforms contained in H.R. 3, the following measures should be considered in this legislation to further improve the transportation conformity process:

Allow Use of Existing MVEB's to Demonstrate Conformity

Areas transitioning into new air quality standards should be allowed to use existing MVEB's addressing the same pollutants or other emissions tests to demonstrate conformity before budgets are available. This avoids the need for project specific conformity determinations and allows the transportation process to proceed without unnecessary delay while adhering to existing environmental safeguards. This provision was contained in the "Safe, Accountable, Flexible, and Efficient Transportation Equity Act of 2004" (S. 1072) as passed by the Senate last session.

Prohibit MVEB Judicial Review

Under existing regulations, EPA can declare a MVEB adequate for transportation planning purposes prior to approval of the entire SIP. This approval process is not as comprehensive as full SIP approval and EPA reserves the right to withdraw its approval at anytime (therefore, it is not a

final agency action). Environmental groups have filed lawsuits alleging that preliminary MVEB approval must be as rigorous as final SIP approval and EPA has not contested jurisdiction in these lawsuits. (i.e., 1000 Friends of Maryland suit against EPA).

Provide Further Protection From Lawsuits

Planners have to rely on current state-of-the-art modeling and good faith estimates to develop air quality and transportation plans. Environmental groups are attacking the estimates and demanding exactitude that doesn't exist.

A requirement on plaintiffs to make an initial showing of bad faith before filing suit would allow only suits with some standard of merit to proceed. In the absence of such a showing, agreement by the MPO, state air quality agency, EPA and U.S. DOT should be *per se* evidence of the validity of emissions estimates. (Example: Sierra Club sued Sacramento for using EPA data). Almost 200 U.S. counties will face conformity for the first time under the revised ozone and particulate matter standards. They will not be able to develop "airtight" plans immediately, thus opening the door to lawsuits. These areas must be given adequate time (at least two years) and adequate resources to develop the detailed databases needed to demonstrate conformity. Smaller MPOs, in particular, are ill-prepared to fulfill all of the conformity requirements.

Ensure Private Sector Transportation Improvement Advocates Have Equal Intervention Rights

Environmental groups are using lawsuits to pressure policy makers and exclude other stakeholders. Contractors and transportation users should have the right to participate in lawsuits as equals to professional environmental groups. A double standard leads to duplicative lawsuits and moves the planning process out of the public forum and into the courtroom.

Conclusion

Mr. Chairman, Ranking Member Boucher, and other members of the subcommittee, ARTBA deeply appreciates having this opportunity to present testimony to you on this critical transportation issue. To summarize my comments:

- The nation is making huge progress on cleaning up the air, but almost all of this progress can be attributed to technology gains, not transportation control measures;

- Greater flexibility and predictability is needed in the transportation planning and conformity process;

- H.R. 3 takes several positive steps towards achieving a workable transportation conformity process that both benefits the environment and allows for needed transportation development.

- More must be done to put a stop to the endless litigation that is tying the transportation planning process into knots;

- Delaying transportation improvement projects results in unnecessary deaths and other negative costs to society.

Again, thank you. I look forward to any questions the Committee might have.